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Via Hand Delivery

OFFICIAL COMMENT

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

Re: Comments on LSA Document #08-764 (Antidegradation)

Dear Ms. Stevens:

On behalf of Indianapolis Power & Light Company ("IPL"), Barnes & Thornburg LLP is submitting the following comments as part of the third notice of public comment period for the Indiana Department of Environmental Management's ("IDEM") proposed antidegradation rule. The LSA document number for the proposed antidegradation rule is 08-764 and these comments are being submitted by the December 30, 2011 deadline identified in the third notice of public comment. IPL appreciates the opportunity to provide these comments.

1. Applicability

Proposed 327 IAC 2-1.3-1(b) and 327 IAC 2-1.3-5(a) apply the antidegradation implementation procedures to proposed new or increased loadings of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act. IPL believes the applicability for the antidegradation rule, including the implementation demonstration, should be based on new or increased discharges that result in an increase in concentration or mass of a regulated pollutant that triggers the imposition of a new discharge limit or a modification to an existing discharge limit in a NPDES permit. As currently proposed, the regulation could be read to apply to any increase in the mass or concentration of a discharge of a regulated pollutant even if that increase either (a) is to the discharge of a regulated pollutant that currently is not subject to a discharge limit and the increase would not result in that regulated pollutant becoming subject to a discharge limit or (b) would be of a regulated pollutant already limited in a NPDES permit and the increase in the amount of the regulated pollutant discharged would exceed current discharge amounts but would not exceed permitted discharge limits in such current NPDES permit. Regarding the first situation, if the current discharge of a regulated pollutant is not subject to a discharge limit and the amount of that pollutant being discharged is increased to a level that also would not result in the imposition of a new or modified discharge limit, such discharge should be classified as de minimus and excluded from

the antidegradation requirements because it simply is too minor to be considered a significant lowering of water quality.

Regarding the second situation, if a company has a process and wanted to add an additional process of the same type as the current process and that addition would not require a modification to a discharge limit in its existing NPDES permit, would add to the amount of a regulated pollutant being discharged that already is limited in the permit, but the increased amount of the regulated pollutant added by the new process would not exceed the concentration and mass discharge limits already contained in a current NPDES permit for that regulated pollutant, it appears that an antidegradation demonstration could be required even though a modification of the discharge limit in the permit would not be required. Because discharge limits included in NPDES permits are based on the more stringent of the effluent limitation guidelines developed for specific industries and activities, water quality standards, and limits based on best professional judgment, IDEM already would have determined that the water body in question in this situation was capable of assimilating the amount of the regulated pollutant at issue in compliance with existing water quality standards and other requirements at a level consistent with the currently permitted mass and concentration limits. Therefore, requiring an antidegradation demonstration for such an increase when there will be no change to the discharge limit is unnecessary and unduly burdensome for both the regulated community and IDEM.

IPL understands and appreciates that the exclusions contained in the proposed 327 IAC 2-1.3-4(c)(2) address changes in existing operations due to operational variability, among other things. However, it does not appear this exclusion is sufficiently broad to overcome the failure to tie increases to changes in permit discharge limits or the addition of new permit discharge limits. Therefore, IPL proposes that 327 IAC 2-1.3-1(b) be revised to include the phrase "that requires a new or increased permit limit" between "to a proposed new or increased loading of a regulated pollutant to surface waters of the state" and "from a deliberate activity subject to the Clean Water Act" and that 327 IAC 2-1.3-5(a) be revised to include the phrase "that requires a new or increased permit limit and" between "Any person requesting a new or increased loading" and "that would cause a significant lowering of water quality". Without these revisions, IPL believes the regulated community could be required to expend unnecessary time and resources to prepare and submit antidegradation demonstrations for changes that otherwise would not require a new or modified NDPES permit discharge limit for the regulated pollutant in question.

2. Regulated pollutant and de minimus

Pursuant to proposed 327 IAC 2-1.3-1(b), the antidegradation implementation procedures apply to proposed new or increased loadings of a regulated pollutant "that will result in a significant lowering of water quality." Proposed 327 IAC 2-1.3-2(51) defines a "significant lowering of water quality" as an increase that is greater than "de minimus" and proposed 327 IAC 2-1.3-4(c)(1) explains what constitutes a de minimus lowering of water quality for high quality waters that are not Outstanding National Resource Waters. According to proposed 327 IAC 2-1.3-4(c)(1) and the definition of "total loading capacity" in proposed 327 IAC 2-1.3-2(53), a determination that an increase is de minimus only applies if the regulated pollutant at issue has a numeric water quality criterion.

According to IDEM's definition in proposed 327 IAC 2-1.3-2(44), a "regulated pollutant" includes pollutants that have a numeric water quality criterion as well as pollutants that do not have a numeric water quality criterion, such as pollutants associated with a narrative water quality criterion. Because the proposed antidegradation implementation procedures apply to any proposed new or increased loading of a regulated pollutant that is not de minimus and a numeric water quality criterion must apply to the regulated pollutant to determine if the increased discharge is de minimus, any new or increased loading of a regulated pollutant that does not have a numeric water quality criterion automatically would be subject to the antidegradation implementation procedures regardless of the actual magnitude of the increase unless it satisfies an exemption.

IPL agrees that a de minimus level should be established below which antidegradation demonstrations are not required. However, defining de minimus so it only applies to regulated pollutants that have a numeric water quality criterion will result in dischargers having to comply with the antidegradation implementation procedures regardless of the actual impact of the increased or new discharge when the regulated pollutant at issue does not have a numeric water quality criterion. This is particularly problematic because, as discussed in comment 1 above, the proposed antidegradation standard is not limited to proposed new or increased discharges that require a modification to or imposition of a new effluent discharge limit.

IPL recommends that the regulation identify a de minimus level for all regulated pollutants or provide an option for the discharger to demonstrate that its new or increased discharge will not significantly impact the water body. This is particularly important for pollutants that may only be associated with narrative water quality criteria. Alternatively, the definition of regulated pollutant could be revised to only include pollutants that have a numeric water quality criterion thereby allowing the proposed de minimus approach to apply to all regulated pollutants. Unless IDEM provides a de minimus option for all proposed new or increased discharges, the regulated community will be required to prepare and IDEM will be required to review antidegradation demonstrations even if the increased discharge will not significantly impact the water body just because the regulated pollutant at issue does not have a numeric water quality criterion.

3. <u>Cumulative cap</u>

IPL agrees that a cumulative cap on increased discharges should be imposed to create a minimum threshold below which all increases must be evaluated. However, IPL does not agree that 90% of the available loading capacity at the time of the initial increase is the appropriate threshold. First, the cumulative cap for non-BCCs in the current antidegradation standard for the Great Lakes portion of the state is 10% of the total loading capacity [327 IAC 5-2-11.3(b)(1)(B)(ii)(BB)] and IDEM has failed to provide any justification for increasing the cumulative cap for the Great Lakes portion of the state to 90% or for imposing a cumulative cap for the non-Great Lakes portion of the state that is different than the current 10% cap. Second, regardless of what cumulative cap is imposed, it is important to note that the cumulative cap provision applies to water bodies that already satisfy the applicable water quality criteria. Therefore, the cumulative cap that is imposed will not endanger the ability of these water bodies

to continue to comply with the water quality standards. To be consistent with the current regulations, IPL suggests that a cumulative cap of 10% of the available loading capacity be used in the proposed rule. Furthermore, if IDEM believes a 10% cumulative cap is not sufficiently protective, it must provide adequate justification for a different cumulative cap and allow the public and regulated community sufficient time to comment on that justification prior to finalizing this rule.

IPL also recommends that an option exist to re-determine the baseline available loading capacity if there has been a subsequent permanent decrease in discharges of a regulated pollutant to the water body. Over time, reductions in concentrations of regulated pollutants likely will occur due to increased controls from advances in wastewater treatment technologies and reductions in or eliminations of discharges due to water management practices, changes in processes and operations, and/or plant closures. Because the quality of water bodies will change over time and such changes will include improvements, freezing the time at which the benchmark available loading capacity is determined to the time of the first increase is not appropriate or justified particularly when such subsequent decreases are associated with permanent reductions.

4. **Noncontact cooling water, approved non-BCC water treatment additives, storm water discharges, increased loadings to accomplish a reduction in air pollutants, and certain other discharges for which some but not all antidegradation demonstration information must be submitted**

The proposed rule at 327 IAC 2-1.3-5(b)(3), (b)(4), (b)(1)(B), (d)(2), and (b)(2) identifies certain new or increased loadings for which the amount of information that must be submitted as part of the antidegradation demonstration is reduced but not eliminated. These new or increased loadings include certain noncontact cooling water discharges, discharges of IDEM approved non-BCC water treatment additives, discharges with enforceable individual NPDES permits for storm water associated with industrial activities, discharges associated reductions in air pollution, and discharges associated with remediations. IPL believes these increased loadings should be excluded from the antidegradation implementation requirements because they either have minimal impacts on the water body, already have been reviewed and approved by IDEM's Office of Water Quality (such as for water treatment additives), or clearly are associated with activities that will improve the environment. As such, requiring an antidegradation demonstration for these discharges, even a limited demonstration, is unnecessary and unduly burdensome. This is particularly true for noncontact cooling water discharges and discharges associated with remediation because to not exempt them from the demonstration requirements would be inconsistent with the approach taken by the majority of other Region 5 states.

Because antidegradation demonstrations require both time and resources to complete, new and existing businesses in other Region 5 states would have a competitive advantage over Indiana if the exemptions from the antidegradation requirements are not expanded. Therefore, IPL proposes that these new or increased loadings be deleted from proposed 327 IAC 2-1.3-5 and moved to the exclusions contained in proposed 327 IAC 2-1.3-4. In addition, IPL would like to note that other new or increased loadings identified in proposed 327 IAC 2-1.3-5(b) and (d)

also likely should be treated as exclusions from the rule and not subject to even the reduced antidegradation demonstration requirements in proposed 327 IAC 2-1.3-5. However, because those identified new or increased discharges are not potentially related to IPL's operations, IPL leaves it to other commentors to provide comments on whether those new or increased loadings also should be excluded from the antidegradation requirements.

5. How much information is required to be included in an antidegradation demonstration

Proposed 327 IAC 2-1.3-5 identifies the types of information that must be included in antidegradation demonstrations. However, the proposed rule is silent regarding the amount of documentation and specific information that must be included as part of a submission to adequately support an antidegradation demonstration. IPL understands IDEM's desire to postpone the development of guidance containing information regarding what it believes is necessary to support an antidegradation demonstration but without knowing this, it is impossible for the regulated community to determine if such information is appropriate and will not result in unduly burdensome requirements. Preparing information for each of the generic topics identified by IDEM for inclusion in antidegradation demonstrations could range from fairly basic documents to major studies. IDEM should provide the regulated community as well as the public with information regarding what it believes is necessary for a sufficient antidegradation demonstration before this rule is finalized to ensure the proposed rule and its economic impact can be adequately evaluated and commented upon. Finally, the detailed information regarding the amount and scope of information that must be included to satisfy each of the antidegradation demonstration topics identified in the proposed rule should be spelled out in the rule itself and not through guidance.

6. IDEM's Fiscal Impact Statement

Because IDEM has failed to identify the scope and amount of information that will need to be included to adequately support an antidegradation demonstration as discussed in comment 5 above, IDEM's economic analysis contained in the fiscal impact statement associated with this proposed rule must be questioned. IDEM's economic analysis is based on the estimated number of submissions which in turn is based on previous permit applications, the number of hours needed to complete an antidegradation demonstration, and the cost per hour to prepare an antidegradation demonstration.

As discussed in comment 1 above, IDEM should limit the applicability of the antidegradation rule to those new or increased discharges that require a new or modified permit discharge limit. Because the number used by IDEM in its fiscal impact statement for how many antidegradation demonstrations would need to be prepared is based on permit applications that have been submitted, apparently IDEM also believes this at least as it relates to calculating the proposed rule's economic impact. However, because the proposed rule is not limited to activities that trigger new or modified discharge limits, IDEM's estimate in the fiscal impact statement regarding the number of demonstrations that will need to be prepared each year is not supported by the information it presented.

Also, because IDEM has not provided any information regarding the amount and specificity of information necessary to constitute an adequate antidegradation demonstration, IDEM can not justify its claim that a full demonstration will require only 16 hours of work. IDEM states the 16 hour estimate is based on Iowa's antidegradation program but fails to state that IDEM's requirements will be the same as Iowa's. Therefore, IPL believes IDEM's 16 hour estimate likely is unrealistically low and certainly has not been supported by IDEM.

Finally, without knowing the amount and specificity of the information to be included in an antidegradation demonstration, claiming the hourly cost will be $100 to prepare the information is not supported. Depending on the magnitude of the information that must be included in an antidegradation demonstration and the extent of any studies that must be included (all of which have yet to be determined by IDEM), it is very likely that the costs per hour to prepare such documentation will exceed the $100 per hour estimate provided by IDEM.

Because the details necessary to determine the costs associated with an adequate antidegradation demonstration have not yet been developed by IDEM and the number of antidegradation demonstrations that will need to be completed are unknown given IDEM's failure to tie this requirement to increased discharges that require the imposition of a new or modified permit discharge limit, it is impossible to know what the actual fiscal impact of this rule will be. That being said, it is highly likely the fiscal impact will be far greater than IDEM's estimate in the fiscal impact statement for the reasons discussed above.

7. Mercury

The proposed antidegradation rule contains provisions for addressing new or increased discharges of mercury. However, Indiana already has a streamlined mercury variance procedure which provides a comprehensive method of addressing mercury discharge issues. IPL believes imposing the proposed antidegradation requirements in addition to the streamlined mercury variance mechanism is unnecessary and will prove to be unworkable. Therefore, IPL proposes that the antidegradation rule be revised to exclude new or increased discharges of mercury that are subject to a variance from the antidegradation requirements.

8. Variances in general

It is unclear whether the proposed antidegradation rule would apply to variances in general. If it will, IDEM should exclude variances from the antidegradation rule because all variances must be evaluated and approved by IDEM under separate requirements. Therefore, imposing antidegradation demonstrations on variances is unnecessary.

9. Tiers 2 and 2.9

The antidegradation standards for Tiers 2 and 2.9 in proposed 327 IAC 2-1.3-3(b) and (c) require the Commissioner to assure that the "highest statutory and regulatory requirements for all new and existing sources are applied" to a discharger if a significant lowering of water quality will be allowed. However, the proposed regulation is silent regarding how this will be done. To

the extent this provision would allow the Commissioner to impose requirements on a discharger that are based on requirements for dischargers in industrial categories that are different from the discharger's industrial category or have not been demonstrated to be applicable control technologies for the discharger in question, IDEM should be required to demonstrate that such controls are appropriate for the discharger in question prior to requiring the use of such controls. This provision should be revised to state that the highest statutory and regulatory requirements for all new and existing point sources to be considered are limited to those statutory and regulatory requirements that apply to point sources in the same industrial classification and are subject to the same effluent limit guidelines that apply to the activities and processes used by the discharger in question.

10. <u>De minimus increases in heat</u>

Proposed 327 IAC 2-1.3-4(c)(1)(B) identifies de minimus increases in heat to water bodies other than Lake Michigan as new or increased discharges the do not result in an increase in temperature outside a designated mixing zone and will not result in an increase in waste heat at an amount greater than the amount required to raise the temperature of the stream design flow of the receiving stream by 1 degree Fahrenheit. In some cases, neither the current NDPES permit nor the associated fact sheet identifies a designated mixing zone for heat. In all cases where a mixing zone has been allowed even if it has not been included in the current NPDES permit or the associated fact sheet, that mixing zone should be considered the designated mixing zone for purposes of this condition. Also, IDEM has not identified any basis for the 1 degree Fahrenheit limitation. 327 IAC 2-1-6(b)(4)(C) identifies a maximum of 5 degree Fahrenheit and 3 degree Fahrenheit increases above natural temperature for streams and lakes and reservoirs respectively as the water quality standard. IDEM should provide a justification for imposing a 1 degree Fahrenheit limitation as de minimus in place of some higher temperature increase for review and comment by the regulated community and the public prior to finalizing this proposed rule.

11. <u>Best available demonstrated control technology</u>

Proposed 327 IAC 2-1.3-2(3) defines best available demonstrated control technology (BADCT) and proposed 327 IAC 2-1.3-5(e)(1) states IDEM will establish accepted effluent limits based on BADCT. However, the proposed rule is silent regarding how IDEM will identify BADCT, how it will determine that the technology it identifies as BADCT "represents cost-effective treatment technology that is readily available", and what role the discharger will have in identifying and determining if such technology actually is cost effective and readily available for the discharge in question. Without such information, this provision of the proposed rule can not be evaluated to determine if it will impose unduly burdensome requirements or is reasonable. Furthermore, it is not possible to determine what costs will be associated with this provision thereby further rendering IDEM's fiscal impact analysis questionable. This information should be provided to the regulated community and the public for review and comment prior to finalizing the proposed rule.

12. Final determinations on antidegradation demonstrations

According to proposed 327 IAC 2-1.3-6(g), the Commissioner will issue a final determination on an antidegradation demonstration and, if approved, incorporate that final determination into a draft permit and fact sheet available for public comment. Because the final determination appears to be a final agency action, that determination will become subject to appeal when it is issued and prior to the issuance of a permit. Also, if the comments received on the draft permit result in changes to the final determination, then that determination will no longer be final and will need to be revised and reissued in final as part of the final permit. This can be resolved fairly simply by identifying the Commissioner's initial determination as a proposed determination and the final determination would be the determination issued as part of the final permit following comment. Should IDEM deny the antidegradation demonstration, that determination should be a final agency action subject to appeal. Furthermore, by requiring an antidegradation demonstration only when a new or modified discharge limit would be required, the linkage between the permit and the antidegradation demonstration would be clearer.

13. Definition of toxic substance

Proposed 327 IAC 2-1.3-2(54) contains a definition of toxic substance that is sufficiently broad to include any chemical, even if the concentration of the chemical actually being discharged is not toxic. Any chemical can be toxic depending upon its dose. By defining the term toxic substance without linkage to the dosage at which the chemical becomes toxic results in this definition becoming unworkable. This definition should be revised to recognize that a substance only becomes toxic and, thus, a toxic substance when the dosage is sufficient to create toxic effects.

If you have any questions, please contact Nysa Hogue at 317/261-5473 or nysa.hogue@aes.com.

Respectfully submitted,

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cc: Nysa Hogue, Indianapolis Power & Light Company

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